82-5317

No. 82-

IN THE

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SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL GENE BERRYHILL,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED

Whether stricter procedural and substantive standards should be applied by trial courts in determing whether to grant a change of venue motion upon the retrial of a capital case?

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Petitioner Michael Gene Berryhill respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia, which has not yet been reported, is annexed hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Georgia was rendered on May 18, 1982. A timely petition for rehearing was denied on June 2, 1982. On July 20, 1982, the Honorable Lewis F. Powell granted a timely motion to extend the time to file this petition from August 1, 1982 to and including August 31, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant

part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

George C. Hooks, Jr. was a prominent businessman and civic leader in the south central Georgia town of Cartersville, Georgia. His murder in 1974 received extensive publicity in the Cartersville and Bartow County press. The eventual arrest of a suspect and later developments in the case were given wide publicity. The Bartow County Herald Tribune of November 27, 1974, for example, included a front page, headline article announcing the arrest of Michael Gene Berryhill and another article listing the members of the traverse jury who would try him for murder. Widespread publicity attended petitioner's Bartow County trial, including detailed accounts of the facts alleged by the State as well as the testimony of most witnesses. On January 9, 1975, petitioner was convicted of felony murder and armed robbery. The following day he was sentenced to die by electrocution. The Supreme Court of Georgia affirmed. Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975) and this Court subsequently denied a petition for certiorari. Berryhill v. Georgia, 429 U.S. 1054 (1977).

After an unsuccessful attempt to obtain state habeas corpus relief, see Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978), the United States District Court for the Northern District of Georgia granted petitioner habeas corpus relief on May 13, 1980, reversing his convictions and sentence.

Petitioner was subsequently re-indicted in Bartow County for the same offense. In June of 1981, jury selection began for his retrial. Petitioner filed a timely motion seeking a change of venue from the small rural county in which he had previously been tried, convicted, and sentenced to death. The trial judge chose to delay a ruling on the motion until after the voir dire was complete. Petitioner sought to strengthen his change-of-venue motion by the introduction into evidence of a public opinion poll. Petitioner produced as witnesses the experts who conducted the poll, and filed a memorandum in support of his motion. The trial judge refused to allow the poll as evidence bearing upon the change of venue issue. Petitioner also filed a motion for an individual sequestered voir dire. The trial court permitted individual voir dire but refused to permit sequestration.

An examination of the voir dire reveals that of the 102 prospective jurors called, 59 veniremen were individually examined. Although the first trial had occurred six years before the retrial, 78 percent of those individually examined remembered reading or hearing the facts of the case, including the previous verdict. Moreover, 42 percent said they had heard friends or neighbors express opinions that the petitioner was guilty. Forty-two percent also stated or implied that they too felt petitioner was guilty. Some jurors were quite frank about their bias:

> "Q. Do you have an opinion here today as to which side shall win this case based on what you have heard up until now? When I say "which side" I mean either the State or the Defendant?
>
> Mr. Curtis: Well, if he did it the State will win.
>
> Q. All right, but do you have an opinion yet as to whether or not the Defendant is guilty or whether or not he did it?
>
> Mr. Curtis: He must have did it. If he didn't he wouldn't be in here."
>
> (Trial Transcript, 295-96)

An exchange with another prospective venireman was similar:

"Q. All right, based on what you and I have just talked about rather generally as far as conversation of people which involves discussing the facts, discussing opinions, guilt or innocence and what punishment is appropriate, based on all three of those things do you think you have found an opinion in your mind as to whether or not he is innocent or guilty?

Mr. Dye: I did at the beginning.

Q. Do you still have that opinion in your mind?

Mr. Dye: I will have that opinion until the defense proves otherwise."

A third exchange exemplifies the attitudes of many prospective jurors:

"Q. Have you had consultations with your friends and family about the case?

Mr. Herrin: Yeah, it has been discussed.

Q. All right, has it been constantly or fairly well spread out since the original incident or was it at one particular time?

Mr. Herrin: I think it was, more or less, when it first happened and then when the situation came up where they were going to have to have a new trial here there was some discussion about it then.

Q. Talk flared up on it again?

Mr. Herrin: Uh-huh [yes].

Q. Now in these conversations that you have had with people, have people expressed their opinions to you as to his guilt or innocence?

Mr. Herrin: Yes.

Q. And what were those opinions?

Mr. Herrin: Guilty.

Q. Any opinion been expressed to you as to what punishment he should get?

Mr. Herrin: Yes.

Q. What were those opinions?

Mr. Herrin: The electric chair.

Q. Now based on your hearing all these opinions have you formed an opinion in this case as to guilt or innocence?

Mr. Herrin: No sir. You know, I'm like Mr. Summey. I think when the first trial, there was something to it that he was convicted, and then due to some legal technicality, as I understand it, is the reason we are up here again."

(Trial Transcript, 210-11)[1/]

The voir dire resulted in the selection of a jury of twelve, eleven of whom knew the facts of the case and three of whom had an opinion as to petitioner's guilt. Following their selection, petitioner renewed his motion for a change of venue. The motion was denied and the trial began fifteen minutes later (Trial Transcript, at 818).

Following the trial, the jury rejected petitioner's defense of insanity and found him guilty of armed robbery and murder. During its deliberations at the sentencing phase, the jury returned to the courtroom three times for additional information indicating that they were deadlocked. After 27 hours, a verdict was rendered sentencing petitioner to death by electrocution (Trial Transcript, 1, 506).

1/ While the two former veniremen were excused for prejudice, the latter was not, the trial judge having accepted the jurors' declaration of impartiality. The court's refusal to strike such jurors was not rare. Although 42 percent of the veniremen stated or implied an opinion as to the petitioner's guilt, only 8 percent were excused because of prejudicial opinions as to guilt.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Prior to his retrial, petitioner filed a "Motion for Change of Venue." The trial judge delayed a ruling until after voir dire. On June 3, 1981, after the selection of the jury, petitioner argued to the trial court that this motion should be granted, since prejudicial pre-trial publicity had endangered his constitutional right to a fair trial by an impartial jury (Trial Transcript, 812-814). Petitioner was allowed to place into the record several newspaper articles about the petitioner's trial history. These articles were introduced in order to show community prejudice. Petitioner also introduced a set of statistics summarizing the results of the voir dire in an effort to show the actual prejudice of the veniremen and jurors. The trial judge denied the motion for change of venue, because he felt the news articles alone were insufficient evidence of community prejudice, and because most veniremen with opinions as to petitioner's guilt said that they could lay their opinions aside. As discussed above, the trial judge refused to consider a public opinion poll in his deliberations on the venue motion.

On appeal, petitioner alleged in his Enumeration D that "the trial court erred in refusing to grant appellant's motion for change of venue." Petitioner argued that the circumstances of this case were inherently prejudicial to his Sixth Amendment right to an impartial jury. (Appellant's Brief, at 13)

The Georgia Supreme Court disagreed, holding that "a motion for change of venue lies within the sound discretion of the trial judge" and that no abuse of discretion existed in this case. (Berryhill v. State, A., at 6)

2. On May 29, 1981, petitioner moved for an opportunity to introduce the results of a public opinion poll, conducted by the University of Georgia School of Journalism in support of his change of venue motion. The motion was denied and the poll excluded even though expert pollsters indicated that the poll was statistically reliable and consistent with professional ethics and practices. (Transcript of Hearings of May 25, 1982, at 23-41, and May 29, 1982, 5-43) Petitioner contended that the poll demonstrated the high level of community prejudice against him and therefore should have been admitted into evidence at the venue hearing. Since the judge did not allow authentication or admittance of the poll, he failed, in effect, to protect the petitioner's right to due process and his right to trial by an impartial jury.(Transcript of Hearings,May 29,1982 at 2)

On appeal, petitioner argued in enumeration D, that the public opinion poll would have verified the prejudicial effects of the extensive media publicity. He also contended that "the Court had an affirmative duty to consider all circumstances that might impede the ability to obtain an impartial jury, that the Court failed to adequately consider the totality of the circumstances, and that such failure is reversible error." (Appellant's Brief, at 17)

The Supreme Court of Georgia was unpersuaded stating that "even if the opinion poll had been tendered in evidence, the appellant would not have met his burden as to change of venue." Berryhill v. State, A., at 8. The Court also noted that petitioner's witnesses initially refused to testify because they did not want to disclose the confidential names of the polled subjects. Berryhill v. State, A., at 5. (Petitioner notes that the witnesses eventually did appear and agree to provide the court with all the information requested.(May 29, 1981 Hearing, at 58)).

REASON FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER MORE CAREFUL STANDARDS SHOULD BE APPLIED BY LOWER COURTS IN RESOLVING CHANGE-OF-VENUE MOTIONS UPON THE RETRIAL OF A CAPITAL CASE

A. In Light Of The Risk Of Substantial Prejudice, More Careful Standards Should Govern Change-Of-Venue Requests In Capital Cases

This Court has long recognized that excessive pretrial publicity can have a prejudicial effect upon jurors in a criminal trial. See, e.g., Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1966). The Court in each of these prior opinions has cautioned that pretrial accounts of a case can create a wave of public passion inherently prejudicial to a defendant. However, in Murphy v. Florida, 421 U.S. 794 (1975) this Court held that in order for a petitioner to show that he was deprived of a fair trial by an impartial jury, he must ordinarily "show that the setting of the trial was inherently prejudicial or that the jury selection process of which he complains permits an inference of actual prejudice." 421 U.S. at 803. Murphy has led many judges to conclude that prejudicial conditions do not exist unless news publicity has been wildly inflammatory; and thus factual news articles have not been perceived as increasing the level of public passion. See, e.g., Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (Ga. 1974), State v. Sunday, 609 P.2d 1188 (Mont. 1980), State v. Sonnier, 379 So.2d 1336 (La. 1979), Commonwealth v. Rolison, 374 A.2d 509 (Pa. 1977). Under Murphy, some trial courts have disregarded the fact that even factual information can nurture a subtle, yet pervasive community prejudice which deprives a

defendant of his Sixth and Fourteenth Amendment rights.

This problem is particularly acute in the retrial of capital cases, where a community may well have been exposed not only to the facts of the case, but also to a jury's judgment on the appropriate sentence to be employed. The knowledge that a jury had previously sentenced the same person to death will lead some veniremen to form a strong opinion as to the appropriate punishment which the community should impose:

> "With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception . . . from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." Irvin v. Dowd, supra, 366 U.S. at 727.

Thus when a capital juror is asked on retrial whether he or she can lay aside their opinions and render a verdict based on the evidence, as the law requires, an affirmative response is not necessarily true. As the Court stated about similar jurors in Irvin v. Dowd, supra, 366 U.S. at 728,

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

This Court has previously insisted that trial courts ensure that a defendant not be unfairly disadvantaged by community prejudice:

> "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighted against the accused." Sheppard v. Maxwell, supra, 384 U.S. at 362 (emphasis supplied).

On the retrial of a capital case, a stricter standard is required to ensure that prejudicial attitudes will not deny the accused a fair trial by a impartial jury or deprive him of his life without due process of law. See generally, Gardner v. Florida, 430 U.S. 349 (1977); Beck v. Alabama, 447 U.S. 625 (1980). Petitioner submits that when prospective jurors state

that they have opinions as to a defendant's guilt, have knowledge of the prior sentencing verdict in the case, or have knowledge of a community presumption of the appropriate sentence, community prejudice should be presumed. Similarly, where a public opinion poll or other social science evidence indicates such community attitudes, prejudice should be presumed.

B. If A Showing Of Actual Prejudice Is Required To Obtain A Change Of Venue In The Retrial Of A Capital Case, Then Trial Courts Should Admit Scientifically Reliable Public Opinion Polls Into Evidence

Currently, no uniform judicial standards govern the circumstances in which public opinion polls should be admitted in criminal proceedings. 76 ALR 2d 632 §11.

However, where a defendant is being retried for a capital offense, reliable, scientifically gathered information about community prejudice is highly relevant to whether venue should be changed. To ignore reliable social science evidence that community prejudice exists is equivalent to an abandonment of the judicial duty to protect a defendant's right to due process of law and a fair trial by an impartial jury. As Justice Black has stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."
> Re Murchison, 349 U.S. 133, 136 (1955) (emphasis supplied).

Thus, if the Court were to hold that defendants, in the retrial of capital cases, must show actual prejudice before a change of venue is required, then trial courts should be required to admit statistically reliable public opinion polls into evidence at change of venue hearings.

CONCLUSION

The writ of certiorari should be granted.

Dated: August 27, 1982

Respectfully submitted,

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In the Supreme Court of Georgia Decided: MAY 18 1982

38206. BERRYHILL v. THE STATE.

JORDAN, Chief Justice.

Michael Gene Berryhill, a/k/a Michael Gene Stanley, was convicted of felony murder and armed robbery by a jury in Bartow County in January of 1975. He received the death sentence for the felony murder and life imprisonment for the armed robbery. His convictions and sentences were affirmed by this court on direct appeal. Berryhill v. State, 235 Ga. 549 (221 SE2d 185) (1975) (cert. den. 429 U. S. 1054 (1977)). The denial of habeas corpus as to the felony murder conviction was affirmed by this court in Berryhill v. Ricketts, 242 Ga. 447 (249 SE2d 197) (1978) (cert. den. 441 U. S. 967 (1979)).

A federal habeas corpus petition was granted by the United States District Court for the Northern District of Georgia on May 13, 1980, and the appellant was retried in June of 1981 in the Superior Court of Bartow County as to guilt-innocence and sentence. He again was found guilty of felony murder and armed robbery and sentenced to death.

The facts surrounding the murder of the victim, George C. Hooks, Jr., and the armed robbery of his wife are adequately set forth in Berryhill v. State, supra, and will not be repeated here.

1. In his first three enumerations of error, appellant argues the general grounds, contending that the evidence established his insanity.

Appellant introduced evidence of his long history of drug abuse and a diagnosis of a sociopathic personality. However, the jury heard evidence to the effect that although the appellant had been drinking and sniffing a glue-like substance on the day of the crime, he had driven around with an accomplice, had obtained from a friend guns which he had stolen in earlier burglaries, had purchased ammunition for the gun that he used to kill the victim, and had planned the burglary of the victim's house. The appellant then carried out the planned burglary. This evidence was elicited from the appellant himself under oath. He also admitted under oath that he broke into the victim's house, fired the fatal shot into the victim, then, having understood what he had done, that he had fled the state to avoid detection for his crime.

The victim's family also testified as to identity and the circumstances of the murder and robbery.

Appellant's own expert witness's testimony established that appellant knew right from wrong, and that appellant was not suffering under a delusional compulsion.

The evidence overwhelmingly supports a finding by a rational trier of fact of each and every essential element of felony murder beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. The appellant complains in his fourth enumeration of error that the trial court erred by failing to grant his motion for change of venue. He asserts that

because of pretrial publicity and local knowledge of the crime and the previous trial and verdict, it was impossible to obtain an impartial jury. We do not agree. First, it must be noted that there were only two instances of pretrial publicity prior to the second trial, both of which were factual in nature, and both of which only reported that the appellant's first conviction and sentence had been reversed and that a new trial was to take place. The trial court made every effort to prevent any pretrial publicity that could taint the jury pool. In fact, the appellant concedes that there is no evidence of a "total inundation of the judicial process by the media" at this trial. Sheppard v. Maxwell, 384 U. S. 333 (86 SC 1507, 16 LE2d 600) (1966); Estes v. Texas, 381 U. S. 532 (85 SC 1628, 14 LE2d 543) (1965); Dick v. State, 246 Ga. 697 (273 SE2d 124) (1980).

Appellant argues that the press coverage at the first trial of the appellant created such an atmosphere in the community that an impartial jury and a fair trial were impossible. However, this pretrial publicity occurred over six years prior to the time of the second trial. Remoteness of time between the trial and the adverse pretrial publicity has been held to be one of the factors in determining whether a change of venue is required. Brooks v. State, 244 Ga. 574 (261 SE2d 379) (1979). While each case must be determined on an individual basis, we hold that evidence of adverse publicity occurring 6 years prior to the trial, without more, is not sufficient evidence of a trial atmosphere "utterly corrupted by press coverage." Murphy v. Florida, 421 U. S. 794, 798 (1974). See Harris v. State, 237 Ga 718 (230 SE2d 1) (1976) (four month break in publicity);

Young v. State, 239 Ga. 53 (236 SE2d 1) (1977) (13 month break in publicity); Brooks v. State, supra, (2 2/3 month break in publicity).

Appellant relies on the fact that the community had knowledge of the prior trial and had formed opinions as to his guilt or innocence based on his previous trial. Both this court and the Supreme Court of the United States have considered the "small-town syndrome" before. Cunningham v. State, 248 Ga. 558 (284 SE2d 390) (1981). A serious case draws public attention, and hardly any prospective juror will not have formed some impression or opinion about the case. However, the proper test is whether the prospective juror "can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U. S. 717 (81 SC 1639, 6 LE2d 751) (1961); Young v. State, supra. In this case, each prospective juror not removed for prejudice expressly indicated that he or she could lay aside any opinion he or she had formed and render a sentence based solely upon the evidence. Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979); Irvin v. Dowd, supra; Dick v. State, supra; Messer v. State, 247 Ga. 316 (276 SE2d 15) (1981).

The record in this case shows that 67 prospective jurors were examined. Of this number, 6 jurors were excused for prejudice or a fixed opinion as to guilt or innocence. Nineteen persons had opinions of guilt but expressly stated that they could lay aside any opinion and render a verdict solely based upon the evidence. This low percentage of venirepersons excused for prejudice (approximately 8%) strongly corroborates the expressions

of impartiality by the other jurors who were not excused for prejudice. Messer v. State, supra (8.3% corroborates an absence of prejudicial publicity.) Murphy v. Florida, supra; Tucker v. State, supra (5% dismissal rate corroborates absence of prejudicial bias); Collier v. State, supra, (20% dismissal rate corroborates absence of prejudicial bias); Coleman v. State, 237 Ga. 84 (226 SE2d 911) (1976) (46% dismissal rate corroborates an absence of prejudicial bias); Butler v. State, 231 Ga. 276 (201 SE2d 448) (1973) (cert. den. 420 U. S. 907 (1974)) (36% dismissal rate corroborates absence of prejudicial community bias).

Appellant also assigns as error the trial court's failure to admit the results of a public opinion poll conducted by the University of Georgia through the efforts of appellant's former attorney, a law professor. Appellant cites no authority for the admissibility of the opinion poll evidence.

The trial judge gave the appellant an opportunity to authenticate the poll. However, because the trial court required a list of persons contacted in the poll for in-camera inspection, to determine whether the jurors actually called had been prejudiced, appellant's witnesses refused to appear and testify. Refusal to testify was based on an ethical consideration about revealing the source of the poll. It must be noted that the members of one juror's family had in fact been contacted.

Appellant had at his disposal the means to require the witnesses to testify, no privilege being present, but failed to avail himself of these means. He cannot now complain.

Furthermore, even if the opinion poll had been tendered in evidence, the appellant would not have met his burden as to change of venue. The results of the poll simply corroborated the fact that the community was aware of the prior trial, and that based on that trial they had an opinion as to guilt or innocence and punishment. However, 85% of those persons contacted noted that the appellant could get a fair trial in the community. Furthermore, the crucial question as to whether their opinions could be laid aside and the issues determined solely upon the evidence presented to the jury was never asked in the poll. And, while the question is not before this court, there are grave reservations about the admissibility of this type of evidence under any circumstance.

A motion for change of venue lies within the sound discretion of the trial judge. Jarrell v. State, 234 Ga. 410 (216 SE2d 258) (1975); Coleman v. State, supra. We find no abuse of discretion here.

3. Prior to trial, appellant challenged the arrays of the grand and traverse juries. The motion challenging the array of the grand jury was sustained, and appellant was reindicted. The trial court overruled the challenge to the array of the traverse jury, and in his fifth enumeration of error appellant contends that this ruling was erroneous because women were underrepresented on the traverse jury list.

In order to make out a prima facie case of jury discrimination, a defendant must establish (1) that a distinctive group or recognizable class in the community has been excluded from the jury list; (2) that an opportunity for discrimination against this group existed from

the source of the jury list; and (3) that the use of the infected source produced a significant disparity between the percentages found present in the source and those actually appearing on the jury panels. See e.g. Duren v. Missouri, 439 U. S. 357 (99 SC 664, 58 LE2d 579) (1979); Bowen v. State, 244 Ga. 495 (260 SE2d 855) (1979) and cits.

At the hearing on the challenge, appellant called as a witness the former superior court clerk, an ex-officio member of the jury commission. No jury commissioners were called to testify. The witness testified to the following factual situation: Of the jury commissioners, two were black males, two white females, two were white males. The traverse jury panel last had been revised in August of 1979. The primary source from which the jurors were drawn was the voter's registration list. However, the list was supplemented by a list of graduating high school seniors and from cards received from persons wishing to be included in the traverse jury list, which resulted from publicity in the news media and public appearances by the clerk of the court requesting such participation. After it was determined by the commissioners that the voter registration list would leave an underrepresentation of blacks and women, the commissioners made an affirmative effort as provided for by Code Ann. § 59-106 to supplement the traverse jury list.

Appellant's statistical evidence consisted of a 1970 census showing the population of Bartow County to be 51.29% female; 48.7% male. The traverse jury list was 39.35% female; 60.64% male for a variance of 11.9%. However, evidence was presented that the county contained

1,564 females over the age of 65 and 1,125 males over the age of 65. A witness testified that many of the males over 65 had requested that their names remain in the box, while none of the females over 65 requested that their names remain in the box. The net effect, therefore, was that 1,564 females over the age of 65 were removed from the available pool of traverse jurors.

After the hearing, the trial judge overruled the jury challenge and in his order stated that there was no evidence of purposeful discrimination or systematic exclusion of any identifiable class; that there was no significant disparity between the percentages of the challenged class in the population and on the jury list, and that the witness who testified had adequately explained and given valid reasons for the variation between the percentages. The judge further found that many women with legal excuses other than being over the age of 65 had requested that their names be removed from the box.

We hold that the trial court was authorized to overrule appellant's jury challenge because appellant failed to show the disparity between the percentage of women in the population and on the traverse jury panel was significant. Bowen v. State, supra. Appellant concedes that a percentage below 11% is not significant. Furthermore, appellant has failed to show an opportunity for discrimination against a distinctive or recognizable class in the community existed from the source of the jury list. Rather, the evidence shows that because the voter registration list was not adequate, the jury commissioners made an affirmative effort to bring the percentage of the identifiable class within the tolerances

required. Thompson v. Sheppard, 490 F2d 830 (5th Cir. 1974); Brooks v. Beto, 366 F2d 1, 24 (5th Cir. 1966).

Appellant further argues that the commissioners' bringing more women into the list after it was determined that they were underrepresented in the voter's registration list set a "target figure" and therefore discriminated. Brooks v. Beto, supra. He stresses the witness's testimony that more women could have been included. However, there must of necessity be a "target figure" to meet the cross section requirement. To say otherwise, that is, to blindly hope that the cross section requirement will be met, is to ignore the statute (Code Ann. § 56-106) and logic. The dicta in Brooks, relied upon by appellant, does not apply because it speaks of a system wherein target figures are employed from the inception of the jury selection process, not a system wherein a remedy is required for underrepresentation.

4. During voir dire, defense counsel in questioning a potential juror, elicited the following responses: ". . .I want to ask you if you are in favor of the death penalty? Juror: Definitely in favor of it. Mr. Neal: . . . Would you always vote for it in a case where death had occurred? Juror: If there was proof of evidence, yes, sir, if the state law allowed it, yes, sir. Mr. Neal: In every case? Juror: In every case the law allowed it." Defense counsel then moved to strike the juror for cause on the basis of a converse of Witherspoon v. Illinois. The court then questioned the potential juror as follows: ". . . In hearing the evidence and the testimony delivered in court will you apply it to the law as given you in charge by the court. Juror: That's what I told him, sir. The Court: But you will abide

by the law as given you in charge by the court? Juror: Certainly. I would have to." The court then denied the motion. Defense counsel then persisted in the line of questioning and asked, ". . . Would you always vote for the death penalty just blindly without even considering what the evidence would be? Juror: No, sir, I wouldn't, I didn't say that. Mr. Neal: You would consider what the evidence was? Juror: The facts. If there is a murder involved and it is the law, the State of Georgia required that the person could be put to death, I would vote for it. Mr. Neal: If the law required it? Juror: Yes."

In his sixth enumeration of error, appellant contends that the trial court erred by not striking a venireperson for cause. In order for a juror to be stricken for cause due to prejudice in favor of the death penalty, he or she must be irrevocably committed to impose the sentence of death regardless of the court's charge and no matter what the facts and circumstances of the case. Hance v. State, 245 Ga. 856, 864 (6) (268 SE2d 339) (1980). As in the case of jurors who are irrevocably committed against the death penalty, it is enough if the juror will consider all of the evidence and will determine whether to impose the death penalty or life imprisonment based upon the evidence presented as applied to the law given in charge by the court. Hance v. State, supra; Westbrook v. State, 242 Ga. 151, 154 (3) (249 SE2d 524) (1978).

In the instant case it is clear from the responses of the juror that he was not irrevocably committed to impose the sentence of death no matter what the facts and circumstances of the case or the court's charge; rather, that he would consider all of the evidence in light of

the charge given by the court. The sentencing instructions of the court necessarily would require the juror to find any aggravating circumstance beyond a reasonable doubt, and to take into consideration mitigating circumstances. The court would specifically instruct the juror that the death penalty is not required by Georgia law in any case. The juror having responded that he would follow the law and evidence, we find no merit in this enumeration. Westbrook v. State, supra.

5. In his seventh enumeration of error, appellant contends that the trial court's refusal to allow him to ask seven questions on voir dire curtailed his right to a thorough and exhaustive examination as contemplated by Code Ann. § 59-705.

We have examined each question and find no merit in this enumeration of error. Three questions dealt with the appropriate punishment should the defendant be found guilty, and with what the prospective juror thought probably had happened to the victim. These questions clearly called for a prejudgment of the case and are prohibited. Waters v. State, 248 Ga. 355 (283 SE2d 238) (1981); Whitaker v. State, 246 Ga. 163 (269 SE2d 436) (1980); Patrick v. State, 245 Ga. 417 (265 SE2d 553) (1979). The other questions sought to elicit information of a technical, legal nature on topics which properly were the subjects of instructions by the trial judge at the close of the evidence. They likewise are prohibited. Wallace v. State, 248 Ga. 255 (282 SE2d 325) (1981). Similarly, questions about the feelings of persons other than the prospective juror, or how those assumed feelings of other persons would affect a prospective juror, are not proper questions for voir dire. Patrick v. State, supra.

Code Ann. § 59-705 controls the permissible scope of voir dire. Voir dire should allow both parties an opportunity to ascertain the ability of the prospective jurors to decide the case on its merits. Whitlock v. State, 230 Ga. 700 (198 SE2d 865) (1973). To that end, the control of voir dire examination is vested in the sound legal discretion of the trial judge and will not be interferred with by this court unless the record clearly shows an abuse of that discretion. Waters v. State, supra.

The last question prohibited by the trial court was a general question asking whether defense counsel had failed to touch upon any matter bothering any prospective juror which would make it difficult for him to serve. The record reveals that voir dire was extensive and prolonged. The trial judge's refusal to allow such a general question was a proper exercise in discretion to keep the voir dire within reasonable bounds. We find no merit in this enumeration of error.

6. After the state's opening statement, the trial court gave defense counsel the opportunity to make his opening statement. Counsel declined, and requested that he be allowed to make his opening statement at the conclusion of the state's case. The request was denied by the trial court, and appellant asserts error. This argument was raised in appellant's direct appeal and in his state habeas corpus appeal. In both instances, the question was decided adversely to him. The trial court relied on the rulings of this court in the two previous appeals. We find no merit in this enumeration of error. Berryhill v. State, supra; Berryhill v. Ricketts, supra.

7. In his ninth enumeration of error, appellant contends that the trial court erred by refusing to permit sequestered voir dire. He argues that questioning the traverse jurors in the presence of each other could have resulted in bias or prejudice, although he cites no actual instances of bias or prejudice. The right to individual examination of jurors given by Code Ann. § 59-705 does not encompass isolated examination. Whether or not to allow individual questioning of jurors to take place outside the presence of the other jurors is a matter within the sound discretion of the trial court. Whitlock v. State, supra; Stevens v. State, 247 Ga. 698 (278 SE2d 398) (1981). There is no merit in this enumeration of error. Messer v. State, supra; High v. State, 247 Ga. 289 (276 SE2d 5) (1981).

8. In his tenth enumeration of error, appellant attacks the constitutionality of the Georgia Unified Appeal procedure. The constitutionality of the Unified Appeal procedure has been upheld by this court in Sliger v. State, 248 Ga. 316 (282 SE2d 291) (1981). Appellant advances nothing not heretofore addressed in that case. There is no merit to this enumeration of error.

9. In his eleventh enumeration of error, appellant contends that the trial court erred by limiting his aunt's testimony to her opinion of his mental competency at the time of the crime, and by allowing her only to give the reasons for her opinion as to his mental competency at that time.

We do not agree. The trial court allowed the witness to give her opinion about the mental competency of the appellant at the time of the alleged criminal act and also to give her reasons for her opinion, including

facts concerning appellant's early childhood. The ruling merely precluded her opinion of his early childhood mental condition from being stated during the guilt-innocence phase of the case.

In his ruling the court specifically told defense counsel that such opinion evidence could be introduced in mitigation. This enumeration of error is without merit.

10. While imprisoned under the original death sentence imposed by the trial court in 1975, appellant was approached by Mr. Tex Fuller, a filmmaker. Mr. Fuller requested that appellant give an interview for the purpose of making a film on capital punishment. At that time, appellant was represented by a lawyer who was to handle his appeal. The appellant did in fact make the film, and during the film confessed to the entire crime.

The state introduced the testimony of Mr. Fuller, and appellant objected thereto, arguing that his Fifth and Sixth Amendment rights were violated, that he did not have assistance of counsel in making the decision on whether to talk with Mr. Fuller, and that the statement was not voluntary in that he was on death row and under the opinion that if he confessed at that time it would make little difference to "future events."

The state presented evidence that Mr. Fuller was not connected in any way with any law enforcement agency, and that the interview was privately initiated. It must be noted that this is not a situation involving an undisclosed government informant, United States v. Henry, 447 U. S. 264 (100 SC 2183, 65 LE2d 115) (1980), or a court-ordered psychiatric examination. Estelle v. Smith, U. S. (SC , 68 LE2d 359). (1981).

The state introduced evidence that no promises were made to appellant to induce his statement and the subsequent filmed interview.[1] Neither was appellant coerced or threatened in any manner to force his participation in the filmed interview. The evidence supports a finding that appellant made a reasoned decision to participate in a film on capital punishment, and the trial court correctly concluded that the statement was voluntary. Statements made to parties which are not law enforcement officers or agents of the state do not require Miranda warnings. Grogan v. State, 154 Ga. App. 606 (269 SE2d 98) (1980). Nor does such an interview trigger an accused's right to counsel under the Constitution of the United States or the Constitution of the State of Georgia. Brewer v. Williams, 430 U. S. 387 (97 SC 1232, 51 LE2d 424) (1977), and Hoffa v. United States, 385 U. S. 293 (87 SC 408, 17 LE2d 374) (1966). "Far from being prohibited by the Constitution, admissions of guilt by wrong-doers, if not coerced, are inherently desirable." United States v. Washington, 431 U. S. 181 (97 SC 1814, 52 LE2d 238) (1977).

Moreover, during his testimony appellant admitted the facts concerning the homicide which were the subject of his filmed interview with the witness. We find no merit in this enumeration.

11. During the presentencing phase of the trial, the jury requested a replay of all the guilt-innocence phase testimony from the victim, her son and the defendant. The replay of testimony is within the sound discretion of the trial court. Beasley v. State, 239 Ga. 49 (235 SE2d 520) (1977). The trial court instructed the jury it should not place undue influence on the replayed

testimony but should take it into consideration with the other testimony presented in the case.

In his thirteenth enumeration of error, appellant contends that the trial court erred in allowing the jury to hear the replay of the testimony because he did not receive notice from the state that this replayed testimony would be entered in aggravation during the sentencing phase of the trial. Code Ann. § 27-2503. We do not agree. This was not additional evidence as contemplated by the statute, but was evidence already before the court and jury. The jury was specifically instructed to consider all of the evidence, both in the guilt-innocence and the punishment phases of the trial, in making a determination of sentence. The trial court did not abuse its discretion. This enumeration is without merit.

Also during the sentencing phase of the trial, the state introduced 34 prior convictions in aggravation. Appellant argues that these convictions were inadmissible because they did not contain his signature. However, the indictments and convictions named appellant, were signed by attorneys representing him, and were certified. Even now, appellant does not argue that these convictions did not apply to him. The court did not err in admitting the evidence of prior convictions.

12. In his fourteenth enumeration of error, appellant contends that the trial court erred in refusing to impose a life sentence after considerable jury deliberation and obvious jury deadlock as to the sentence.

A review of the record shows that the jury began its deliberations at 11:17 a.m. on Friday and deliberated until 2:25 p.m., when the request to rehear the testimony of the three witnesses discussed in division 11, was made

to the court. The jury resumed deliberations at 5:45 p.m., and deliberated until 6:30 p.m., at which time the jury retired for dinner. The jury then deliberated for one more hour, until 9:00 p.m., before advising the court they were divided 10-2. The jury retired for the evening and returned the next day at 9:00 a.m. They reached their verdict at 2:55 p.m. Total jury deliberation time was 10 hours and 8 minutes. The trial lasted for 4 days. A review of the transcript indicates the jury never informed the court that they were hopelessly deadlocked and no dynamite charge was given or required. This enumeration of error is totally without merit.

13. In his fifteenth enumeration of error the appellant contends the trial court failed upon its own motion to grant a mistrial when the state, during cross examination, asked the appellant about his prior criminal record. Prior to this time appellant, as part of his defense, introduced evidence of his prior criminal record. Pretermitting waiver in that defense counsel did not object, we find no error. Dick v. State, supra at p. 706; Brown v. State, 237 Ga. 467 (228 SE2d 853) (1976).

14. Appellant contends in his sixteenth enumeration of error that the trial court erred by refusing to grant a mistrial on its own motion due to highly inflammatory remarks made by the district attorney.

During cross examination of the appellant, the state inquired into his employment status. The question asked was, "You worked in a theater when you were a kid but after being an adult, say from 18 on up, did you ever hold a job in your life longer than 3 months?" The answer of the defendant was ". . . I was very lucky to even be out 3 months. No, sir, I didn't." The defense

objected to this line of questioning on the grounds of relevancy, and in answering the court's inquiry as to how this was relevant, the district attorney stated, "I expect to show to this jury, through this defendant's testimony of his own, that he has done nothing other than steal and burglarize and rob for his whole life and kill . . ." The defense counsel objected to the last comment of the district attorney and asked for curative instructions. The trial court sustained the objection and gave the curative instructions as requested by defense counsel.

Appellant now argues that although the court honored his request for curative instructions, the remark of the prosecutor was so pronounced and persistent that it permeated the entire atmosphere of the trial. However, appellant placed his own character in evidence prior to this statement, and presented witnesses who testified that he had engaged in an endless stream of criminal activities since he was 14 years old and began sniffing glue. We do not find such remarks to be so prejudicial as to be incurable by instructions. Dick v. State, supra; Thomas v. State, 248 Ga. 247 (282 SE2d 316) (1981).

15. Appellant filed a general motion for funds which the court denied. However, in denying the motion, the court instructed counsel it would entertain motions for specific requests for funds, such as for interviewing out-of-state witnesses, if required. Appellant now contends, in his seventeenth enumeration of error, that the trial court erred in denying his general motion for funds. This enumeration is totally without merit. The providing of funds to an indigent defendant is within

the sound discretion of the trial court, Whitaker v. State, supra. The trial court instructed the appellant he could obtain funds for specific purposes if needed and the appellant did not avail himself of this remedy. The appellant cannot now complain.

16. In his last enumeration of error, appellant asserts the cumulative effect of all of the errors alleged denied him a fair trial. After having reviewed the errors alleged and finding them to be without merit, this court also finds this enumeration to be without merit.

SENTENCE REVIEW

As required by Georgia Laws, 1973, p. 159 et seq., (Code Ann. § 27-2537 (c) (1-3)), we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury and the evidence concerning the crimes and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

The jury found the following aggravating circumstance: The offense of murder was committed while the offender was engaged in another capital felony, to wit, armed robbery (Code Ann. § 27-2534.1 (b) (2)).

The evidence supports a finding of the aggravating circumstance by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

We have reviewed the trial court's charge to the jury and found it not subject to the defects dealt with in Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1977), or in Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1977).

This court has independently reviewed the record as mandated by the Unified Appeal Procedure and has found no addressable error other than those enumerated by the appellant.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases decided since Berryhill v. State, supra, listed in the appendix, and the cases listed in the appendix of appellant's original appeal, support the affirmance of the death penalty.

This was a cold-blooded killing of an unarmed victim in the full view of his wife and children for the sole purpose of financial gain. The victim was killed in the style of an execution after he had been wounded to the extent that he was helpless. His son was forced to lie down next to the victim as he died. The 19 cases in the appendix in which the death penalty was imposed support the death penalty in the instant case. All these cases involved the deliberate, unprovoked killing of a robbery victim or victims, and thus show the willingness of juries to give the death penalty under these circumstances.

The evidence supports a finding that the defendant had the intention to take a life. The appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Judgment affirmed. All the Justices concur.

38206. BERRYHILL v. THE STATE.

APPENDIX

Smith v. State, Ga. (SE2d) (Case No. 38247, decided 4/6/82); Cunningham v. State, 248 Ga. 558 (284 SE2d 390) (1982); Cervi v. State, 248 Ga. 325 (283 SE2d 263) (1981); Thomas v. State, 248 Ga. 247 (282 SE2d 316) (1981); Justus v. State, 247 Ga. 276 (276 SE2d 242) (1981); Solomon v. State, 247 Ga. 27 (277 SE2d 1) (1980); Dick v. State, 246 Ga. 697 (273 SE2d 124) (1980); Dampier v. State, 245 Ga. 427 (265 SE2d 565) (1980); Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979); Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Cobb v. State, 244 Ga. 344 (260 SE2d 60) (1979); Baker v. State, 243 Ga. 710 (257 SE2d 192) (1979); Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979); Potts v. State, 241 Ga. 67 (243 SE2d 510) (1978); Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978); Stanley v. State, 240 Ga. 341 (241 SE2d 173) (1977); Corn v. State, 240 Ga. 130 (240 SE2d 694) (1977); Pulliam v. State, 236 Ga. 460 (224 SE2d 8) (1976); Dobbs v. State, 236 Ga. 427 (224 SE2d 3) (1976).

No. 82-5317

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RECEIVED
AUG 30 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MICHAEL GENE BERRYHILL,

Petitioner,

-against-

STATE OF GEORGIA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Michael Gene Berryhill, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Georgia without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Mr. Berryhill's affidavit in support of this motion is annexed.

JOHN CHARLES BOGER
10 Columbus Circle
New York, New York 10019

ATTORNEY FOR PETITIONER

RECEIVED
AUG 30 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL GENE BERRYHILL,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, MICHAEL GENE BERRYHILL, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to relief.

1. Are you presently employed? Yes ___ No ✓

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   b. If the answer is "no," state the date of last employment and theamount of salary and wages per month which you received.

   1973, Superior Trucking, Inc. made about $900.00 month.

2. Have you received within the last twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes ___ No ✓
b. Rent payments, interest or dividends? Yes ___ No ✓
c. Pensions, annuities or life insurance payments? Yes ___ No ✓
d. Gifts or inheritances? Yes ✓ No ___
e. Any other sources? Yes ___ No ✓

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. My mother sends me money periodically to purchase stamps from prison store. About $15.00 month

3. Do you own cash, or do you have money in checking or savings account?

Yes ✓ No ___ (Include any funds in prison accounts.)
If the answer is "yes," state the total value of the items owned. About $125.00 in prison account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes ___ No ✓
If the answer if "yes," describe the property and state its approximate value. ___

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. ___

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Michael Gene Berryhill

MICHAEL GENE BERRYHILL

STATE OF GEORGIA
COUNTY OF BUTTS

MICHAEL GENE BERRYHILL, being first duly sworn under oath, presents that he had read and subscribed to the above and states that the information therein is true and correct.

Michael Gene Berryhill

MICHAEL GENE BERRYHILL

Subscribed to and sworn to before me,
this the 12 day of August, 1982.

Aaron Rogers

Notary Public

My Commission expires:
9-20-83

CERTIFICATE

I hereby certify that the petitioner herein, MICHAEL GENE BERRYHILL, has the sum of $ 132.49 on account to his credit at the Georgia Diagnostic and Classification Center where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said Georgia Diagnostic and Classification Center: None

David Cawthon, Actg. Treas.

Authorized Officer of Institution 8/13/82

RECEIVED
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SUPREME COURT, U.S.

NO. 82-5317

IN THE

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OCTOBER TERM, 1982

MICHAEL GENE BERRYHILL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Attorney General

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QUESTION PRESENTED

I.

Whether the trial court, and the Georgia Supreme Court on direct appeal, properly rejected Petitioner's Motion for a Change of Venue?

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NO. 82-5317

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MICHAEL GENE BERRYHILL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner, Michael Gene Berryhill, a/k/a Michael Gene Stanley, was indicted in the Superior Court of Bartow County, Georgia, for the felony murder of George C. Hooks, Jr., on October 7, 1974. After a trial by jury in January 1975, Petitioner was convicted of both charges and sentenced to death for the murder and life imprisonment for the robbery.

On direct appeal, Petitioner's convictions and sentences were affirmed. Berryhill v. State, 235 Ga. 549, 221 S.E.2d 185 (1975), cert den., 429 U.S. 1054 (1977). Petitioner then sought State habeas corpus relief which proceedings resulted in the

setting aside of his armed robbery conviction while the felony murder conviction and death sentence were upheld. Berryhill v. Ricketts, 242 Ga. 447, 249 S.E.2d 197 (1978), cert den, 441 U.S. 967 (1979). Subsequently, Petitioner was granted federal habeas corpus relief as to the murder conviction on the basis of a Miranda violation.

Petitioner was retried in June 1981, in the Superior Court of Bartow County, Georgia; the jury returned a guilty verdict on the felony murder charge and imposed a death sentence.

PART TWO

SUMMARY OF ARGUMENT

I.

Based upon this Court's established guidelines, concerning prejudicial, pre-trial publicity which might serve to deprive a criminal defendant of a fair and impartial jury, Petitioner has failed to show that a denial of his Motion for Change of Venue was unconstitutional. In addition, Petitioner sets forth no reasons requiring admission of the results of the public opinion poll conducted for purposes of this case.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S MOTION FOR CHANGE OF VENUE WAS PROPERLY DENIED IN ACCORDANCE WITH THE GUIDELINES ESTABLISHED BY THIS COURT.

A. PETITIONER FAILED TO SHOW THAT THE TRIAL SETTING WAS INHERENTLY PREJUDICIAL OR THAT THE JURY SELECTION PROCESS INDICATED ACTUAL PREJUDICE.

Petitioner maintains that this case warrants the development of a new standard by this Court applicable to change of venue motions in the retrial of capital cases. Respondent submits that no such standard is constitutionally mandated, particularly, in the instant case where only minimal evidence of community prejudice is presented.

The trial court denied Petitioner's Motion for Change of Venue on the basis that an insignificant percentage of jurors was excused because they could not lay aside their previously-formed opinions regarding the case. (Trial Transcript, p. 817-818). The Georgia Supreme Court held that the low percentage (8%) of venirepersons excused for prejudice corroborated the impartiality of the other venirepersons.

In regard to pretrial publicity, only two occurrences were established prior to Petitioner's 1981 retrial, however, Petitioner focuses on the publicity attendant to his 1975 trial, conviction and sentence. 1/

1/ Respondent would note that Petitioner's contention that his Motion for Change of Venue in the first trial should have been granted was rejected on direct appeal. Berryhill v. State, 235 Ga. 549, 550, 221 S.E.2d 185 (1975), cert den. 429 U.S. 1054 (1977).

As Petitioner acknowledges, he is required to show either "[1] that the setting of the trial was inherently prejudicial or [2] that the jury selection process which he complains permits an inference of actual prejudice." Murphy v. Florida, 421 U.S. 794, 803 (1975). In Murphy v. Florida, supra, 20 of the 78 prospective jurors were excused for prejudice (26%) and this Court held that that percentage "by no means suggests a community with sentiment so poisoned against Petitioner as to impeach the indifference of jurors who displayed no animus of their own." 421 U.S. at 803. Accordingly, the 8% of venirepersons excused for prejudice in the present case does not indicate any circumstances which could have denied Petitioner a fair trial.

Petitioner contends that stricter standards, regarding pretrial publicity and prejudice, should be set by this Court for the retrial of capital cases. Respondent would note Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980), cert den., 450 U.S. 936 (1980), reh. den., 451 U.S. 933 (1981), a Georgia death case which this Court declined to review under similar circumstances:

> We note finally that the evidence shows only one recent newspaper article concerning the Appellant. Eighteen pages of exhibits concern articles published in the first trial - that is, two years prior to resentencing, and three pages of exhibits concern the United States Supreme Court's reversal of sentence. There is no evidence of a "total inundation of the judicial process by the media." Estes v. Texas, 381 U.S. 532 (85 S.Ct. 1628, 14 L.Ed.2d 543) (1965);

Sheppard v. Maxwell, 384 U.S. 333 (86 S.Ct. 1507, 16 L.Ed.2d 600) (1966).

Also see, U.S. ex. rel. Parson v. Anderson, 354 F.Supp. 1060, 1083-1084 (D. Del., 1972), aff'd, 481 F.2d 921 (1973).

Respondent maintains that the rule proposed by Petitioner, "that when prospective jurors state that they have opinions as to a defendant's guilt, have knowledge of the prior sentencing verdict in the case, or have knowledge of a community presumption of the appropriate sentence, community prejudice should be presumed." (Petitioner's brief p. 10), presents an impossible standard equivalent to that rejected by this Court in Irvin v. Dowd, 366 U.S. 717, 723 (1961):

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.

Therefore, Petitioner has failed to establish any necessity for the development of new standards by this Court, especially, in light of the insubstantial evidence presented here.

B. THE TRIAL JUDGE PROPERLY REFUSED TO ADMIT THE RESULTS OF THE PUBLIC OPINION POLL CONDUCTED AT THE REQUEST OF PETITIONER'S ATTORNEY.

The Georgia Supreme Court upheld the trial court's refusal

to admit the results of a public opinion poll conducted by the University of Georgia School of Journalism at the request, and under the supervision, of one of Petitioner's attorneys. The Georgia Supreme Court aptly noted that Petitioner neither authenticated the poll nor presented any authority requiring admission of such evidence. In addition, the poll was not directed to the pivotal question, whether persons having an opinion could lay that opinion aside if serving on Petitioner's jury.

The only effort to authenticate the poll was through the testimony of a law professor, who acting as one of Petitioner's attorneys, helped organize the poll but admittedly was not an expert statistician. The two journalism professors who could have testified as to the reliability and validity of the poll refused to appear because they did not want to reveal the names of the individuals polled to the trial judge for an in-camera inspection. Consequently, the trial judge ruled:

> . . . The Court is not going to consider this information since none of the interviewers have appeared to testify about their methodology and what they did and who they called and what the answers were, and neither has the expert in polling come in or statistician to discuss the size of the sample, the standard deviation and all of the statistical material that goes into validating - showing that a survey is valid and reliable. (Hearing Transcript, May 25, 1981, p. 46).

It would appear that the existing case law, regarding the use of public opinion polls to evaluate a Motion for Change of Venue, disfavors the use of such evidence, at least in comparison to the data derived from an extensive voir dire examination. United States v. Haldeman, 559 F.2d 31, 64, Ftn. 43 (D.C. 1976), the Court of Appeals for the District of Columbia held:

> In reaching the conclusion that a change of venue was required, the dissent relies heavily on two disparate, although equally suspect, indicia. The first is a poll commissioned by the Appellant and conducted by a public opinion research company. This Court has previously held, however, that a trial judge, sitting in lieu of a jury, is not required to accept expert testimony. Hightower v. United States, 117 U.S. App. D. C. 43, 325 F.2d 616 (1963), cert den., 384 U.S. 994, 86 S.Ct. 1903, 16 L.Ed. 1009 (1966). Similarly, the trial court must also be afforded discretion in accessing the weight to be given expert testimony that is submitted - as was this evidence - in support of a pretrial motion. Indeed, such discretion is peculiarly necessary where the expert evidence consists of the result of a public opinion poll - data that is open to a variety of errors. Cf. Ziesel, The Uniqueness of Survey Evidence, 45 Cornell L.Q. 322, 339-344 (1960). It is our judgment that in determining whether a fair and imparital jury could be empanelled the trial court did not err in relying less heavily on a poll taken in private by private

> pollsters and paid for by one side than on a recorded, comprehensive voir dire examination conducted by the judge in the presence of all parties and their counsel pursuant to procedures, practices and principles developed by the common law since the reign of Henry II.

A similar view was expressed by the district court in United States v. Mandel, 431 F.Supp. 90, 100-101 (D. Ma. 1977), aff'd, 602 F.2d 653 (4th Cir. 1979):

> Defendants have submitted the results of a public opinion poll in an attempt to demonstrate that actual prejudice exists among prospective jurors to such an extent that an impartial jury cannot be selected. The conclusions drawn in the poll appear to invade the province of the court and are based upon hearsay information. In the opinion of the court, a public opinion poll is no substitute for voir dire examination. Cf. U.S. v. Partain, 320 F.Supp. 275 (E.D. La. 1970). (footnote deleted).

Based on the foregoing, Petitioner's arguments regarding admission of the public opinion poll do not warrant review by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari filed on behalf of the Petitioner, Michael Gene Berryhill.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JANICE G. HILDENBRAND, a member of the bar of the Supreme Court of the United States and counsel-of-record for the Respondent, hereby certify that in accordance with the rule of the Supreme Court of the United States, I have this day served a true and correct of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of the same in the United States Mail with proper address and adequate postage to:

John Charles Boger
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New York, New York 10019

This 23th day of September, 1982.

Janice G. Hildenbrand
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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 82-5317

MICHAEL GENE BERRYHILL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

CERTIFICATE OF FILING UNDER RULE 28

I, JANICE G. HILDENBRAND, A Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on September 28, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition on the above-styled case.

Janice G. Hildenbrand
JANICE G. HILDENBRAND

Sworn to and subscribed
before me this ____ day
of September, 1982.

Jan Lawson
NOTARY PUBLIC

My Commission Expires:

Notary Public, Georgia, State at Large
My Commission Expires June 11, 1984